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The Unnecessary Victims' Rights Amendment

Robert P. Mosteller*

The principal purpose of this essay is to examine the major justifications advanced by supporters of the proposed Victims' Rights Amendment (the "Amendment") that they contend *require* victims' rights to be protected through the unique form of a constitutional amendment. I begin with what should be an uncontroversial proposition: proponents of an amendment to the United States Constitution bear a heavy burden of persuasion and must be able to justify enactment of *the amendment* on substantive grounds. I conclude that the Amendment is *unnecessary*, and therefore its proponents simply have not made their case.

I. THE UNSUPPORTED CLAIMS OF THE AMENDMENT'S PROPONENTS

Professor Laurence Tribe, a supporter of the Amendment, has articulated a set of claims that he contends supports passage of the Amendment:

The problem . . . is that such [nonconstitutional] rules [supporting victims' rights] are likely, as experience to date sadly shows, to provide too little real protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia, or any mention of an accused's rights regardless of whether those rights are genuinely threatened.¹

A somewhat different argument is made by the National Victims' Constitutional Amendment Network ("NVCAN") in response to the question of why a constitutional amendment is needed:

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¹*Proposals for a Constitutional Amendment to Provide Rights for Victims of Crime: Hearings on H.R.J. Res. 173 and H.R.J. Res. 174 Before the House Comm. on the Judiciary*, 104th Cong. 242 (1996) (statement of Laurence H. Tribe, Professor, Harvard Law School). A similar statement is contained in a July 6, 1998, op/ed piece in the *Los Angeles Times* co-authored by Professors Tribe and Cassell. See Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B5 (arguing that "[r]ules to assist victims frequently do not provide meaningful protection whenever they come into conflict with bureaucratic habit").

Until victims' rights are recognized in the U.S. Constitution, they will always be subject to the rights of the accused. The defendant's constitutional right to a fair trial has been used to deny victims the right to be present; the defendant's right to be free from cruel and unusual punishment has been used to deny victims the right to be heard at sentencing; the criminal's right to equal protection has been used to deny victims the right to be heard at parole hearings. There will be no equal treatment of victims until they are given equal rights. Victims' rights must be given constitutional standing in order to be effective.²

The above statements contain claims of two basic types. First, the Amendment's proponents argue that, regardless of the existence or nonexistence of defendants' rights, governmental officials ignore victims' rights found in federal or state statutes and state constitutional provisions. Second, the Amendment's backers claim that either through the actual operation of defendants' constitutional rights or through excessive deference to defendants' constitutional claims, victims are denied their established rights under statutory law and state constitutional provisions.

I will examine these two claims in some detail below. First, however, I will answer another argument that is sometimes made in support of the Amendment—that national uniformity is required with respect to a fundamental set of victims' rights.³ If absolute, formal uniformity is demanded, the argument for a constitutional amendment is valid to that extent. However, if some degree of variation is acceptable, then federal legislation setting standards for state legislation, buttressed by federal financial incentives would serve as an effective way to accomplish a type of "flexible uniformity." As demonstrated by "Megan's Law,"⁴ that statutory mechanism can operate very effectively and could successfully encourage states to adopt a detailed group of victims' rights as well.⁵ Moreover, as developed throughout this essay, specific aid and guidance in implementing victims' rights is likely

²NATIONAL VICTIMS' CONSTITUTIONAL AMENDMENT NETWORK, BACKGROUND KIT 9 (Apr. 1998) [hereinafter NVCAN BACKGROUND KIT].

³See Paul G. Cassell & Steven J. Twist, *Rule of Law: A Bill of Rights for Crime Victims*, WALL ST. J., Apr. 24, 1996, at A15 (arguing that state protections are "piecemeal and inadequate" and that federal amendment should be enacted to establish "floor" below which state protected rights could not fall).

⁴See Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 42 U.S.C. § 14071(d) (Supp. II 1996)) (establishing statutory mechanism that encourages states throughout United States to enact provisions requiring community notification when convicted sex offenders take up residence in their communities).

⁵See Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009, 39.013 (1997) (providing detailed implementation rules for release of sexual offender data).

more important to their full enjoyment than is uniform national recognition of a minimal set of rights.⁶

I will not examine further the argument that a federal constitutional amendment is necessary to achieve uniformity, because I find this argument entirely unconvincing. Uniformity is not required or, for that matter, even preferred when it comes to establishing a set of victims' rights. Our collective thinking on the precise definition of victims' rights is in its infancy, and we are hardly ready to embed a set of largely unchangeable rights into the Constitution. Rather, patience is particularly appropriate because of the extraordinary political popularity of victims' rights, which will ensure that the issue will not be ignored. Indeed, public officials and politicians throughout the nation will continue to experiment in positive ways to protect the interests of victims.

A. The Asserted Need to Cure "Official Indifference"

No governmental bureaucracy operates perfectly, and the criminal justice system is hardly an exception. Given this context, it is preordained that existing victims' rights are not uniformly enforced. Nonenforcement of rights through various institutional failures may collectively be termed "official indifference."

In a recent commentary, conservative constitutional scholar Bruce Fein discussed this official indifference to victims' rights, noting that a federal constitutional right both is unnecessary and would provide no guarantee of effectiveness:

Nothing in the Constitution or in any Supreme Court precedent inhibits the enactment of state or federal laws that protect crime victims. Indeed, victims' rights legislation is a staple of contemporary political life and seems destined to remain so. The beneficiaries command virtual

⁶In their *Los Angeles Times* editorial, Professors Tribe and Cassell cite a recent study that "victims' rights are more frequently denied to racial minorities and presumably other disfavored groups who are unable to assert their interests effectively. Only an unequivocal constitutional mandate will translate paper promises into real guarantees for all victims." Tribe & Cassell, *supra* note 1, at B5. Surely Professors Tribe and Cassell are not arguing that the problem is the lack of constitutional protection, when the issue is unequal protection of minorities as to state guaranteed rights, which is the issue examined in the study. See NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS: SUB-REPORT: COMPARISONS OF WHITE AND NON-WHITE CRIME VICTIM RESPONSES REGARDING VICTIMS' RIGHTS (1997). Protection against racial discrimination as to rights guaranteed under state law is already explicitly in the Equal Protection Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV.

universal sympathy, a fail-safe formula for legislative success. Crime victims need no constitutional protection from political overreaching.

It is said by amendment proponents, however, that state judges and prosecutors often short-change the scores of existing victims' rights statutes. If so, they would equally be inclined to flout the amendment. The judicial oath is no less violated in the first case as in the second.

Furthermore, time will solve grudging bows to victims' rights. Most aging judges and prosecutors matured when victims' rights were stepchildren of the law. They instinctively resist any novelty or innovation in their work habits, such as requirements to notify and consult with crime victims in preparing and conducting a criminal prosecution and in sentencing the guilty.

But the geriatric detractors of victims' rights will soon die or retire in favor of new judicial and prosecutorial officials inculcated with a victims' rights agenda and devoted to exacting enforcement standards.

....

The cresting of the amendment ironically comes when our constitutional system of federalism is addressing victims' rights exactly as the Founding Fathers hoped.

Through statutes and state constitutional amendments, the 50 states are experimenting with varied approaches to blending the competing interests of victims, prosecutors, defendants and manageable judicial caseloads in search of an enlightened formula. The mix in one jurisdiction may exalt the cathartic needs of victims, while in another the interest in judicial dispatch reigns supreme.⁷

Fein's principal argument is simple and compelling. Enacting a federal constitutional amendment will not cure the failures by judges and prosecutors to follow existing laws.⁸ Indeed, if such "bureaucrats" are willing to ignore the requirements of existing, binding law that they have sworn to uphold, adding another layer of law supporting the same right has no necessary impact.⁹

Significantly, the vast majority of the provisions in the proposed Victims' Rights Amendment that was approved by the Senate Judiciary Committee in July 1998 fall into this category of correcting official indifference.¹⁰ The enforcement of these rights does not conflict with any

⁷Bruce Fein, *Deforming the Constitution*, WASH. TIMES, July 6, 1998, at A14.

⁸*See id.* (rejecting argument that judges and prosecutors will be more inclined to protect victims' rights under Amendment).

⁹*See id.* (stating that judges and prosecutors "would be equally inclined to flout the Amendment").

¹⁰*See* S.J. Res. 44, 105th Cong. § 1 (1998) (listing rights victims should have during official proceedings).

constitutional right of defendants, and therefore, violations occur as a consequence of governmental officials' either purposefully or inadvertently ignoring their existing legal obligations.¹¹ The right to notice of all proceedings unequivocally falls into this category, as does the right of notice of release or escape of the defendant. Similarly, the right to be present and to be heard at many types of proceedings, such as hearings to determine conditional release from custody, acceptance of a negotiated plea, and parole, can also receive protection either by demanding compliance by state officials with established laws or by passing such laws and promulgating appropriate administrative procedures. The problem with enforcing these victims' rights does not and cannot result from judicial protection of defendants' constitutional rights, because such rights are nonexistent in these areas. Finally, as a matter of legal entitlement, the right to restitution may be granted as fully and effectively by statutory or state constitutional right as it can be by federal constitutional right, and the defendant convicted of an unlawful act against the victim has no basis for constitutional challenge to such an order.¹²

Of course, one cannot know whether enshrining the right in a federal constitutional amendment would cause judges and prosecutors to take their oaths more seriously. Perhaps, but the impact is almost entirely speculative.¹³

¹¹However, a few of the rights found in the Amendment may, in fact, conflict with and pose significant harm to constitutional rights of defendants. *See infra* notes 33–48 and accompanying text (discussing elimination of sequestration rules through victims' right to be present); *infra* Part II (discussing other potential harms that Amendment would inflict upon defendants' rights).

¹²Enforcement of orders of restitution may be subject to limitations based on due process principles. Arguably, similar restrictions would continue to operate if the right to restitution were guaranteed by a federal constitutional provision.

¹³Those who argue that a federal constitutional amendment would be helpful in overcoming official indifference can claim some support from a study by the National Victim Center showing that victims enjoy more rights in states with strong victims' rights laws. *See* NATIONAL VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS 154 (1996) [hereinafter NVC REPORT]. The results, which are entirely unsurprising—more protections are provided in states that provide more protections—give no answer to the question of whether a federal constitutional provision is necessary in addition to vigorous enforcement of state laws to achieve a high level of enforcement.

Indeed, when local officials were surveyed and asked for suggestions to improve treatment of victims of crime, the leading proposal was for increased funding. *See id.* at 102–04 (noting that funding was mentioned by more local officials than any other factor in both states with strong and with weak legal systems for protecting victims). When state officials were surveyed, those in the states with strong legal protections believed that increased funding was most important, while those in states with weak existing legal protections supported establishing, enhancing, and/or enforcing victims' rights within the system. *See id.* at 118–19.

The weight that can be attached to any aspect of this report is, however, unclear. While the report was prepared under a grant from the National Institute of Justice ("NIJ"), it was

authored by the National Victim Center (recently renamed the National Center for Victims of Crime), which is an advocacy group publically committed to the enactment of a federal constitutional amendment. See The National Center for Victims of Crime, *Tour of the National Center for Victims of Crime* (visited May 18, 1999) <http://www.nvc.org/main/ctr_tour.htm>. Upon completion of the report, the Federal Office of Victims of Crime ("OVC") "requested that the complete report NOT be published because, in its view, the report contains contradictory information which could, in the hands of a victim advocacy community not generally experienced with research methodologies and reports, be inadvertently [sic] misused and thereby compromise OVC policy objectives." Memorandum from Sam McQuade, Program Manager, NIJ, to Jeremy Travis, Director, NIJ (May 16, 1997) (approved by Mr. Travis on May 20, 1997) (on file with author) [hereinafter McQuade Memo]. Kathryn M. Turman, Acting Director of the OVC, responded to the above quotation in a draft of this essay by disagreeing that the study would "compromise OVC policy objectives." Letter from Kathryn M. Turman, Acting Director, OVC, to Robert P. Mosteller, Professor, Duke University Law School, 1 (Sept. 18, 1998) (on file with author). She reiterated the OVC's concerns, stating: "While we maintain that the NVC study has utility, however, we do have some methodological concerns about the study and believe that more research would be needed before any policy recommendations could be made based on the data." *Id.*

In a response to my criticism of the National Victim Center study, Professor Cassell stated: "The study also obtained a very high response rate (83%) from the victims interviewed, suggesting that the findings are not due to any kind of responder bias." Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 510 (footnote omitted). That rate, which is prominently displayed in the report, gives no cause for confidence that responder bias is absent, but instead suggests the report's bias. The response rate was, in fact, 58% for those successfully contacted and 29% for victims identified for contact.

Four states were involved in the study—two with "weak" and two with "strong" victims' rights. In each of these states, victims names were obtained from department of corrections and crime victim compensation records. See NVC REPORT, *supra*, at 16. The 83% figure comes from 1308 completed interviews within a group of 1507 subjects contacted by phone who acknowledged that they or a family member had recently been a crime victim. See *id.* at 17. The remaining 17% either started but failed to complete the survey or refused to participate. See *id.*

However, a total of 2245 individuals, not 1507, were successfully contacted by telephone. See *id.* Of those contacted, 665 denied that they or any family member had been a crime victim despite the contrary information provided by state authorities, and they were dropped from the survey. See *id.* Thus, only 58.2% of those contacted completed interviews, not 83%. Moreover, the 2245 figure constituted just slightly more than half of the total of 4474 names with phone numbers provided in the four states. See *id.* The rest could not be reached during the period designated for telephone contact. Thus, the 1308 completed surveys represents only 29.2% of the sample population.

[R]esponse rates of 90% or more are reliable and generally can be treated as random samples of the overall population. Response rates between 75% and 90% usually yield reliable results, but the researcher should conduct some check on the representativeness of the sample. Potential bias should receive greater scrutiny when the response rate drops below 75%. If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn.

FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 239 (1994) (footnote omitted). A response rate of only 29.2% is unimpressive indeed.

The necessity of giving the additional dignity to these rights that a federal constitutional provision would entail is particularly questionable given the extraordinary popularity of victims' rights provisions. Normal political processes will, with time, effectively punish those administrative officials and even judges, many of whom are elected, who ignore the popular mandate to give victims greater notice and voice in the process.

Moreover, the existence of constitutional rights will not automatically eliminate official indifference to specific individual rights. For example, a recent ABC news report described how thousands of people arrested in New York City between 1996 and 1997 for minor offenses, such as driving with a suspended license or selling sneakers on the street without a vender's permit, were subjected to strip searches that federal courts had previously ruled illegal under the Fourth and Fourteenth Amendments to the Constitution.¹⁴ The existence of a federal constitutional right did not prevent this huge "bureaucratic snafu," which is likely to cost the city millions of dollars.¹⁵

This official indifference to the Fourth Amendment rights of arrested suspects serves as a good point of departure for evaluating the impact of enacting a constitutional amendment for victims. While I have used the term "official indifference" to describe the failure of officials to enforce fully existing victims' rights, that term is perhaps too negative in characterizing motivation. Most officials are not disdainful of victims or their rights, as is sometimes the case in the highly contentious and occasionally combative relationship between defendants and those in law enforcement. Indeed, malevolence, or even true indifference towards victims' rights, is largely unknown. Instead, I believe that officials fail to honor victims' rights largely as a result of inertia, past learning, insensitivity to the unfamiliar needs of victims, lack of training, and inadequate or misdirected institutional incentives. However, the most important reason that existing victims' rights

Another type of distortion was also introduced. In three of the states, the names and phone numbers were provided directly to the researchers. In the fourth, the victims were initially sent a letter by state officials requesting their permission to participate, and only if they provided written consent were their names forwarded to the researchers. See NVC REPORT, *supra*, at 20. Thus, an undisclosed and presumably a substantial percentage of victims from one of only two "strong protection" states were excluded from the sample by self-selection.

¹⁴See John Miller & Peter Jennings, *A Closer Look: Why People Were Strip Searched for Minor Crimes*, WORLD NEWS TONIGHT, April 23, 1998, available in 1998 WL 7292306 (discussing incidence of illegal strip searches, and stating that "[b]etween 1996 and 1997 New York City officials say because of a bureaucratic snafu, prison officials simply overlooked a requirement that an officer needed to have reasonable suspicion . . . before conducting a strip search").

¹⁵*Id.*

are not more fully enforced is the lack of resources and personnel needed to accomplish this new and additional set of tasks.

Fortunately, if nonrecognition of victims' rights results, as I contend, from the system's inability to find the time and personnel necessary to notify, consult, and protect, this problem can be overcome by greater resources in most instances and by administrative sanctions for failure to comply in those rarer cases that approach actual indifference. A commitment of resources and administrative sanctions surely will exert a major impact in making victims' rights a reality for large numbers of victims; to the contrary, the result of enacting a federal constitutional amendment, a largely symbolic act with respect to enforcing existing rights, is of speculative value by comparison. The Amendment's lack of direct effectiveness is particularly clear because it prohibits damage awards for violations of its provisions,¹⁶ though damages are even available for violations of the Fourth Amendment rights of citizens, such as the improper strip searches cited earlier.¹⁷

Although the amendment is not *necessary* to achieve enforcement of victims' participatory rights, such as notice and an opportunity to be heard, I want to acknowledge that a federal constitutional amendment could operate as a helpful mechanism for enforcing victims' rights against public officials through federal class action litigation that I doubt many of its political supporters would endorse. Damage actions are barred by Senate Joint Resolution 44,¹⁸ but suits for declaratory and injunctive relief are not. Class actions to enforce participatory rights against states also appear available. The Minority Report on Senate Joint Resolution 44 indicates that, in response to inquiry, the Justice Department acknowledged that federal court orders against states, like those in prison reform litigation, would be possible.¹⁹ Indeed, this "specter of extensive lower federal court surveillance of the day to day operations of state law enforcement operations" has led the Conference of Chief Justices to oppose the Amendment.²⁰

¹⁶See S.J. Res. 44, 105th Cong. § 2 (1998) (stating that "[n]othing in this article shall give rise to or authorize the creation of a claim for damages against the United States, a State, a political subdivision, or a public officer or employee").

¹⁷See *supra* text accompanying notes 14–15.

¹⁸See S.J. Res. 44, 105th Cong. § 2 (1998).

¹⁹See S. REP. NO. 105-409, at 71 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) (stating that, according to Department of Justice, when district attorneys fail to provide full notice to victims as required under Amendment, "the relief would be court orders like those in prison reform legislation"); see also *id.* at 49 (minority view of Sen. Thompson) (voting against proposed Amendment and expressing similar concern).

²⁰Letter by Joseph R. Weisberger, Chief Justice, Rhode Island Supreme Court, and Chairperson, Task Force on Victim Rights of the Conference of Chief Justices, to Sen. Orrin Hatch 1 (May 16, 1997) (on file with author).

One may imagine various scenarios for how the Amendment, if enacted, might affect activities in the federal and state courts. The prospect of the lower federal courts' closely superintending the operations of state law enforcement to ensure that victims' rights are protected is one that might trouble traditional conservatives most. Nevertheless, federal supervision of state criminal proceedings is clearly a possible consequence of adopting the Amendment. Enforcing the Amendment in this fashion likely would have a substantial impact upon the effectiveness of victims' rights, but that fact does not make enacting the Amendment necessary to effective enforcement. Because of the political popularity of victims' rights, alternatives are available that less harshly impact federalism concerns. By contrast, such alternatives are generally unavailable to protect the rights of the politically unpopular.²¹

B. Arguments That the Amendment Is Required to Counter Defendants' Rights That Allegedly Trump Victims' Rights or to Eliminate Excessive Judicial Deference to Defendants' Interests

The second argument advanced by the Amendment's supporters centers on the courts' treatment of defendants' rights and takes two forms: first, that a federal constitutional provision is required to eliminate the ability of defendants to trump legislation and state constitutional provisions through invocation of federal constitutional provisions; second, that the Amendment will eliminate the current excessive judicial deference to those constitutional provisions protecting defendants' rights. Here, I challenge the factual premise. I assert that victims' rights simply have not been thwarted by defendants' claiming constitutional protection. If a federal constitutional provision is required, those who support it should bear a burden of proof, not conjecture, that the problem of defendant "trumping" is real. However, they cannot produce the evidence.²²

²¹The federalism concerns behind the recent movement to prohibit Congress from imposing "unfunded mandates" upon the states may argue against enforcing victims' rights through injunctions and class action law suits. See S. REP. NO. 105-409, at 71 (1998) (minority views of Sens. Leahy, Kennedy, and Kohl) (noting that proposed amendment really imposes "another funding mandate"). The argument is arguably inapposite for a constitutional amendment that must be supported by three-fourths of the states, since the vast majority of states would have approved imposing the requirement on themselves. The more appropriate question is whether these consequences will be revealed accurately or instead hidden by supporters in the political process in order to secure enactment.

²²In the *Los Angeles Times* editorial, Professors Tribe and Cassell quote from a report "that today 'large numbers of victims are being denied their legal rights.'" Tribe & Cassell, *supra* note 1, at B5. As noted earlier, the NIJ directed that the "complete report NOT be

Let us look at four rights proposed in the Amendment—(1) to be notified; (2) to be present; (3) to be heard; and (4) to receive restitution—and ask for the evidence that a constitutional provision is required. The first of these rights can be eliminated from the search. No one can argue that anything in the federal constitution protecting defendants inhibits the right of notice regarding any public criminal proceeding. Enforcement of three rights—to be present, to be heard, and to receive restitution—are thus of interest.

As to these three rights, I shall examine two related but distinct types of cases: (1) the reversing of a conviction under the federal constitution because a victim had exercised a state or federal right; and (2) the invalidation of a victims' right under the federal constitution without an impact upon a criminal conviction. The first task, which one would assume should be easy for the Amendment's supporters, is to find ANY currently valid appellate opinion reversing a defendant's conviction because of enforcement of a provision of state or federal law or state constitution that granted a right to a victim. Before attending this Symposium, I issued a challenge to the

published" for methodological reasons. See McQuade Memo, *supra* note 13, at 1; see also *supra* note 13 (discussing NIJ request that complete report not be published). Among the obvious methodological flaws is that all the alleged violations of rights come from unverified, self-reported data. See NVC REPORT, *supra* note 13, at 9–24 (describing study methodology). Victims simply reported system failures that they perceived in their own cases without any determination of the accuracy of those reports. *Id.*

Even more significant for the present inquiry, nothing in the report provides support for a claim that defendants' rights are the reason that victims' rights are not being enjoyed. All violations identified result from failures of officials to comply with legal requirements. In some instances, the legal structure in the states chosen did not even permit a testing of the possibility that defendants' constitutional rights were trumping victims' statutory rights. In the important area of the right to attend trial, the laws on witness sequestration in three of the four states involved in the study did not have a specific provision covering victims, and in the fourth state, a victim/witness was to be sequestered until after testifying as the first witness. See NVC REPORT, *supra* note 13, at 88. There is no indication that judges failed to comply with the letter of the existing established law because of a valid claim by the defendant of constitutional rights or excessive deference to an invalid claim.

When Professors Tribe and Cassell state that victims' rights have been denied and cite the National Victim Center Report, they cannot be claiming that defendants' rights caused victims' rights to be "denied." Instead, the claim is only that state officials failed to enforce fully provisions in the law according to the unverified reports of victims.

participants to produce such a case.²³ Not a single case was produced!²⁴ Obviously, the type of significant body of law that would warrant the remedy of a constitutional amendment simply does not exist.²⁵ Moreover, the

²³These Symposium participants included Professor Paul Cassell, Mr. Steve Twist, member of the Executive Committee of the National Victims' Constitutional Amendment Network, Professor Douglas Beloof, author of a new textbook on victims in criminal procedure, and Professor William Pizzi.

²⁴In connection with the hearings on the proposed amendment conducted by the Senate Judiciary Committee in April 1998, Senator Leahy asked Professor Cassell to provide the appellate cases of which he was aware in which defendants successfully overturned their convictions based on the victim's presence in the courtroom or other state or federal victims' rights provision. See *A Proposed Constitutional Amendment to Protect Crime Victims: Hearings on S.J. Res. 44 Before the United States Senate Comm. on the Judiciary*, 105th Cong. 128 (1998) (responses of Paul G. Cassell to questions from Sen. Leahy) ("I would like to know all of the appellate cases of which you are aware in which defendants have successfully overturned their convictions based on the presence of victims' rights provisions—and where the decision overturning a conviction or excluding witnesses has been upheld on appeal.") [hereinafter *Professor Cassell's 1998 Answers*]. Professor Cassell provided no specific cases, deferring response until the completion of a treatise on the subject with Professor Beloof and referring the Senator to a collection of cases by NVCAN. See *id.* I have examined the NVCAN listing, and it contained no cases in this category or the one discussed below involving cases where victims' rights, rather than defendants' convictions, are "trumped" by federal constitutional provisions. See NVCAN BACKGROUND KIT, *supra* note 2, at 16–21.

In connection with the hearings conducted in the Senate Judiciary Committee in March 1999, Professor Cassell was again asked whether he could find such appellate cases, and responded that he could not. See *Senate Judiciary Constitution Subcommittee Hearing on S.J. Res. 3, A Proposed Constitutional Amendment to Protect Crime Victims* (Mar. 24, 1999) (questions from Sen. Patrick Leahy for Paul Cassell) (answer to question 1) (acknowledging that he is "not aware of any appellate cases today of the type you describe" while disputing the significance of the lack of appellate cases). The challenge thus remains unanswered.

²⁵The closest case I can find in any of the writings of Professor Cassell or the case listings by the National Victim Center/NVCAN to one that reverses a criminal conviction based on action enforcing a victim's right is *State v. Guzek*, 906 P.2d 272 (Or. 1995). In *Guzek*, a defendant's conviction was reversed because victim impact evidence, allowable pursuant to a recently enacted citizen initiative, was introduced, but the state's death penalty statute allowed the jury to hear only evidence of mitigating measures. See *id.* at 275. The state supreme court found that the evidence went to aggravating circumstances and was thus irrelevant, and reversed. See *id.* at 287. However, the error is not one of federal constitutional stature. Indeed, *State v. Moore*, 927 P.2d 1073 (Or. 1996), decided the next year, stated that a change in the statute rendered *Guzek* irrelevant. See *id.* at 1085 n.13. Further, the Arkansas Supreme Court recognized that *Guzek* is a product of the nature of the state's own construction of its death penalty statute, not of federal constitutional law. See *Noel v. State*, 960 S.W.2d 439, 447 (Ark. 1998) (allowing introduction of victim impact evidence during sentencing phase because, unlike in *Guzek*, such evidence was permissible under Arkansas law); see also *State v. Mohammad*, 678 A.2d 164, 177 (N.J. 1996) (citing *Guzek* for proposition that "[o]nly a few states have banned the introduction of victim impact evidence"). The Majority Report on Senate Joint Resolution 44 indicates that enacting the Amendment would not change the *Guzek* result but would leave determinations of relevancy of victim impact evidence to state determination. See S. REP. NO. 105-409, at 28–29 (1998) (stating that "Congress and the States

Amendment's supporters cannot claim that defendants or prosecutors would not be motivated or equipped to litigate these cases at the appellate level. If the cases cannot be found, and they cannot, the reason must be because they do not exist. No failure of motivation or explanation that the cases occurred but were not reported would logically explain their absence. Certainly, evidence of excessive deference to defendants' rights is entirely lacking.

The second category for inquiry consists of cases where no conviction was reversed, but instead where the victim's statutory or state constitutional right to a protection was ruled invalid because of a defendant's federal constitutional right. I likewise requested cases in this category from the Symposium participants. I received only one, *State ex rel. Romley v. Superior Court*.²⁶

Romley fits the bill in one sense, but is beside the point in another. It fits in that a state constitutional right of victims—here Arizona's far-reaching right of victims to be free of discovery by the defense—was rendered ineffective by a federal constitutional provision—the due process right to present a defense.²⁷ However, the case is inapposite in that the proposed Federal Victims' Rights Amendment apparently would not affect the results, because in its present formulation, the Amendment does not protect victims against discovery or the release of confidential information.²⁸

More significantly, *Romley* presents one of the most powerful arguments against an aggressive form of the victims' rights movement, which I label its "Prosecutorial Benefit" dimension.²⁹ *Romley* appears to involve a classic case

remain free to set certain limits on what is relevant victim impact testimony"); *see also infra* notes 71–74 and accompanying text (discussing cases where victim impact evidence was determined inadmissible and why).

²⁶836 P.2d 445 (Ariz. Ct. App. 1992).

²⁷*See id.* at 451–55 (holding that federal constitutional due process rights override victims' right to refuse discovery).

²⁸The 1995 proposal by the National Victims' Constitutional Amendment Network contained a right of victims "to be free from unwarranted release of confidential information." William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 39 n.13 (1996). That provision did not make its way into Senate Joint Resolution 44. *See* S.J. Res. 44, 105th Cong. § 1 (1998) (listing victims' rights in proposed amendment and containing no provision for right to be free from unwarranted release of confidential information).

²⁹*See* Robert P. Mosteller, *Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY'S L.J. 1053, 1054, 1058–64 (1998) (stating that "category of support for the victims' rights amendment comes from those who are more generally animated by a pro-prosecution, anti-defendant perspective on criminal law" is called "Prosecutorial Benefit") [hereinafter Mosteller, *Moving from Guaranteeing Participatory Rights*]. Perhaps the more appropriate term is "Defendant Damage" rather than "Prosecutorial Benefit" because the changes appear more directed at harming defendants' interests than at necessarily benefitting the prosecution.

of a battering relationship in which the female spouse uses violence against her abusive spouse and is labeled, perhaps erroneously, the defendant. As the case recites:

The defendant alleges that the stabbing of her husband was not an unjustifiable attack but an act of self-defense. The defendant claims that

My key conclusions in that essay are:

What is clear from the drafting process is that those who seek substantial services from the government or seek participation in the process, if that participation conflicts with government priorities, are losing, or have lost, the battle. Also, the amendment may support Participatory Rights but not at any real monetary cost to the government, and if a conflict is perceived between Participatory Rights and effective prosecution, effective prosecution prevails.

....

In general, rather than taking power or resources from government and giving it to victims, the taking is from defendants. The right of victims is "not to be excluded" by defendants rather than a right to require the government to afford presence, and the right is to have victims' safety considered in denying the defendant bail rather than a right against the government to provide protection for the victim. By contrast with most participatory rights, expanding such so-called victims' rights, which fall within the Prosecutorial Benefit category *does* require constitutional action when they conflict with guarantees already granted by the Constitution to defendants.

Id. at 1058–60. Fortunately, several changes made in 1998 reduced the potential harm to individual liberties. The most important of these positive changes was to remove from section three of the Amendment the provision that gave states, along with Congress, "the power to enforce this article within their appropriate jurisdictions by respective legislation." S.J. Res. 6, 105th Cong. § 3 (1997). Compare *id.* with S.J. Res. 44, 105th Cong. § 3 (1998) (eliminating "and the States" language from section three of proposed amendment). See generally Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1704–09 (1997) (determining that authorizing states to enforce federal victims' rights amendment would "take away rights from defendants" and would "introduce great uncertainty into criminal litigation") [hereinafter Mosteller, *An Effort to Recast the Battle*].

My major remaining criticism is that much of the force behind the Amendment is motivated by and directed toward the goal of Prosecutorial Benefit/Defendant Damage. If Defendant Damage is not a goal of the proposed Amendment, supporters can easily prove me wrong. In the Judiciary Committee proceedings during 1998, Senator Richard Durbin proposed a modification to the proposed Victims' Rights Amendment by adding a provision to section six that "[n]othing in this article shall be construed to deny or diminish the rights of an accused as guaranteed by the Constitution." S. REP. NO. 105-409, at 38 (1998). His proposal was defeated on a 6 to 10 vote. See *id.* Senator Durbin's proposal would eliminate much of my concern that the Amendment is a destructive rather than constructive instrument, and it is the most important alteration that should be made if the proposed Amendment is to become part of our Constitution. See Mosteller, *Moving from Guaranteeing Participatory Rights*, *supra*, at 1064–65 ("Such a provision would help to direct the Amendment toward serving the legitimate function of enhancing Participatory Rights and inhibit excessive damage to our existing constitutional structure in service of the inappropriate goal of providing Prosecutorial Benefits under the politically and emotionally powerful label of victims' rights.").

she has been the victim of horrendous emotional and physical abuse by her husband during their marriage; that the victim is a mental patient with a multiple personality disorder who, on the date of the alleged aggravated assault, was manifesting one of his violent personalities, a personality who was resisting "integration" during treatment by his psychiatrist and by a Christian pastor.

....
The defendant, not the victim, made the "911" call to the police at the time of the alleged incident, asking for help She requested help, according to the transcript of the call, because her husband was beating her and threatening her with a knife. When the police arrived at the home, they found the husband (victim) bleeding from a stomach wound allegedly inflicted by the wife (defendant) with a knife. A police report reveals that the victim has been arrested three times for assaulting the defendant and was convicted in Florida in 1989 for assaulting the defendant.³⁰

What the "defendant" sought but what the Arizona Victims' Rights Amendment protected was the psychiatric records that could have aided her in establishing the truth of her defense.³¹ As the Arizona Court of Appeals stated in ruling that the defendant's federal due process right required production of the records:

[The Victim's Bill of Rights] should not be a sword in the hands of victims to thwart a defendant's ability to effectively present a legitimate defense. Nor should the amendment be a fortress behind which prosecutors may isolate themselves from their constitutional duty to afford a criminal defendant a fair trial.³²

Romley constitutes the only clear case where the Federal Constitution "trumped" a state victims' right provision. If enactment of the proposed Victims' Rights Amendment were to change that result, it would constitute a very strong argument against, rather than in favor of, enactment. A domestic violence case like *Romley* shows the danger of using the label of victims' rights to deny procedural protections important to determining guilt. Here the identity of the true victim is profoundly uncertain, and a provision is dangerous and unwise that presumes conclusively that the person initially labeled as the victim by the prosecution is entitled to protections that would help alter outcomes.

³⁰*Romley*, 836 P.2d at 450.

³¹*See id.* at 447.

³²*Id.* at 454.

As quoted early in this essay, the NVCAN asserts that defendants' rights have been used to "trump" three rights of victims.³³ First, NVCAN asserts that the "defendant's constitutional right to a fair trial has been used to deny victims the right to be present."³⁴ This result is clearly possible under our present constitutional scheme. The right to a fair trial guaranteed under the Federal Constitution might be denied by a victim's presence. Therefore, a judge would be correct in excluding a victim/witness from some part of the trial where that result would occur. How frequently does that conflict arise? I believe Professor Cassell correctly noted several years ago that "[s]uch an argument seems unlikely in all but the most extreme circumstances."³⁵

By allowing the exclusion of witnesses from the courtroom during the testimony of others, sequestration rules aim to keep sequestered witnesses from purposefully or unconsciously shaping their testimony to accord with that of the earlier witnesses. Such rules are of ancient and venerable origin.³⁶ A jurisdiction may, however, decide that allowing victims who are also witnesses to be present throughout the proceedings is of greater value than the threat of tainting the victim/witness's testimony. To minimize the degree to which victims will be excluded, the first step a state should take is to make crystal clear that it considers the interests of victims in attending all aspects of judicial proceedings to outweigh the potential taint to the testimony of victims who are also witnesses. This decision is most effectively accomplished through a positive statement in the law governing the sequestration of witnesses, typically codified in Rule 615 of the jurisdiction's rules of evidence, that victims may not be excluded from the courtroom under the

³³See *supra* note 2 and accompanying text (discussing NVCAN's arguments in support of Amendment).

³⁴NVCAN BACKGROUND KIT, *supra* note 2, at 9.

³⁵Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effect of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1393.

³⁶See 6 WIGMORE, EVIDENCE § 1837 (Chadbourn rev. 1976) (tracing origin of witness sequestration rule to story of Susanna in Apocrypha). Two elders, who coveted Susanna but were rebuffed by her, falsely accused her of adultery with a young man whom they claim overpowered them and fled. See *id.* Those assembled believed the accusation and were ready to punish Susanna, but Daniel asked first to examine the two accusers separately. See *id.* They had claimed to have seen Susanna committing adultery in the garden. See *id.* As each came to be examined, Daniel asked where in the garden had Susanna and the young man committed the adulterous act. See *id.* The first answered under one tree, but when the other was brought in, he testified that it happened under an entirely different tree. See *id.* At that point those assembled saw that the accusers had lied and rose against them. See *id.*

rule. A number of states have taken this action and excepted victims as a class from their sequestration rules.³⁷

As one should reasonably expect, these evidentiary provisions have effectively allowed victims to sit in the courtroom throughout the proceeding. These provisions work because sequestration is generally a matter of statutory or common law, and sequestration only rarely even approaches constitutional significance.³⁸ I have found one case, *Martinez v. State*,³⁹ that

³⁷See ALA. R. EVID. 615(4) (providing that victim or representative of victim who cannot attend is exempt from witness sequestration rule); ARIZ. R. EVID. 615(4) (providing that victim is exempt); ARK. R. EVID. 616 (providing that adult victim and guardian of minor victim are exempt); OR. REV. STAT. ANN. § 40.385(4) (1988) (providing that victim is exempt); N.H. R. EVID. 615(1) (providing that victim is exempt).

Other states exempt victims but not through a blanket provision. See FLA. STAT. ANN. § 90.616(d) (Supp. 1999) (providing that victim, victim's next of kin, parent or guardian of minor child victim, or lawful representative is exempt from exclusion "unless, upon motion, the court determines such person's presence to be prejudicial"); OKLA. STAT. ANN. tit. 12 § 2615(5) (Supp. 1998-99) (stating that victim, representative, or parent is exempt "upon the motion of the State to bar such exclusion, unless the court finds such exclusion to be in the interest of justice"); UTAH R. EVID. 615(1)(d) (exempting adult victims of crime "where the prosecutor agrees with the victim's presence"). Still other states forbid exclusion of the victim/witness after giving testimony. See LA. CODE EVID. art. 615(A)(4) ("If a victim is to be exempted from the exclusion order, the court shall require the victim to give his testimony before the exemption is effective."); MICH. COMP. LAWS ANN. § 780.761 (Supp. 1998) ("If the victim is called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies."); WASH. REV. CODE ANN. § 7.69.030(11) (Supp. 1999) (providing that victim should be scheduled early in proceedings and allowed in court after testifying).

Presumably, enactment of the Amendment would render unconstitutional all the provisions except those that grant victims a blanket exclusion from sequestration. How would it be constitutional to forbid victim/witnesses to testify under a state rule because they had exercised their constitutional right to be present?

³⁸The opinion of the Arkansas Supreme Court in *Stephens v. State*, 720 S.W.2d 301 (Ark. 1986) appears sensible and gives an example of when reversal might be required under federal constitutional principles.

Inasmuch as the rule permitting the exclusion of witnesses originated with the legislature, we can conceive of no reason why the rule cannot be modified in the same manner, or by court rule if need be. We can suppose that there would be circumstances when the victim's presence throughout the trial could be seen as putting the fairness of the trial in jeopardy, as occurred in *Commonwealth v. Lavelle*, 277 Pa. Super. 518, 419 A.2d 1269 (1980).

Stephens, 720 S.W.2d at 303.

In the *Lavelle* case cited by the Arkansas Supreme Court in *Stephens*, a failure to sequester witnesses upon defense request resulted in a reversal. See *Pennsylvania v. Lavelle*, 419 A.2d 1269, 1274 (Pa. Super. Ct. 1980). The record did not reveal whether the witnesses had ever identified the defendant through pretrial identification procedures. See *id.* at 1273. Nevertheless, these witnesses identified the defendant, who apparently was in the courtroom throughout, after they had heard police officers testify that he was the perpetrator and had been photographed in the bank where the crime occurred, and after some witnesses had heard other

may qualify as limiting victim access allowed under a specific rule based on constitutional principles, albeit state rather than federal constitutional principles.⁴⁰ In *Martinez*, the defendant challenged the trial court's decision to permit the victim to remain in the courtroom during opening statement.⁴¹ The Florida District Court of Appeals ruled that, because the facts of the case were "hotly disputed," the trial judge should have excluded the victim from the opening statement, the only part of the trial that the victim would have missed.⁴² However, the court found that the error was harmless, and thus affirmed the conviction.⁴³

The more typical result is reflected by the experience in Utah where, as judged by reported opinions and anecdotal evidence at the trial court level, the rule has been uniformly effective in allowing victims to remain in the courtroom throughout the proceeding.⁴⁴ For example, in *State v. Beltran-Felix*,⁴⁵ the Utah Court of Appeals upheld Utah's version of Rule 615 against constitutional challenge, even when the victim appeared as the last witness in the State's case, which is significant because the danger that sequestration rules seek to avoid only grows the later the witness appears in the trial.⁴⁶

In the face of these substantial successes of statutory or rule provisions, Professor Cassell and the NVCAN declare, not victory, but defeat. Referring to *Beltran-Felix*, NVCAN notes that "[a]lthough the Court of Appeals agreed

bank tellers identify the defendant. *See id.* This is the type of fact pattern where our system of laws should require the sequestration of victims who are eyewitnesses, and this is one of the rare cases where the defendant's constitutional right to a fair trial could and should overcome the alleged victim's interest in being present.

³⁹664 So. 2d 1034 (Fla. Dist. Ct. App. 1996).

⁴⁰It appears that the court found the failure to sequester the witness during opening statement to violate the state constitution rather than the Federal Constitution. *See id.* at 1035–36. Neither *Martinez*, nor *Gore v. State*, 599 So.2d 978, 985–86 (Fla. 1992), which *Martinez* applied, cites the Federal Constitution or federal case law. Instead, they rely upon Article 1, section 16(b) of the Florida Constitution, which gave victims the right "to be present to the extent that these rights do not interfere with the constitutional rights of the accused." *Martinez*, 664 So. 2d at 1035 (quoting FLA. CONST. art. I, § 16(b)); *Gore*, 599 So. 2d at 985 (same).

⁴¹*See Martinez*, 664 So. 2d at 1034–35.

⁴²*Id.* at 1036.

⁴³*See id.*

⁴⁴I can find no evidence that any trial court in Utah has violated the rule and excluded a victim from the courtroom. I have repeatedly asserted this claim to Professor Cassell, and he has given no indication that he is aware of a violation that has occurred since the rule became effective.

⁴⁵922 P.2d 30 (Utah Ct. App. 1996).

⁴⁶*See id.* at 34–35; *see also State v. Cosey*, 873 P.2d 1177, 1181 & n.5 (Utah Ct. App. 1994) (upholding victim's presence without reaching constitutional issue); *State v. Rangel*, 866 P.2d 607, 611–13 (Utah Ct. App. 1993) ("Rule 615, as applied, did not unfairly impinge on defendant's right to a procedurally correct trial.").

with the trial court that the victim properly attended the trial in this case, it pointedly refused to hold clearly that victims always have such rights.”⁴⁷ Professor Cassell characterizes the nonabsolute decision as

an intolerable burden on crime victims through Utah in future cases . . . [who] will now have to decide whether to exercise their right to attend a trial at the expense of giving the defendant an issue to raise on appeal and to possibly even overturn his conviction. . . .

....
The only way to clearly end this dilemma for crime victims is through a federal constitutional amendment.⁴⁸

⁴⁷NVCAN BACKGROUND KIT, *supra* note 2, at 17. The reference by NVCAN and by Professor Cassell is to footnote six of the *Beltran-Felix* opinion, which goes about as far as a court could reasonably go in assuring victims that constitutional issues are not presented by the typical case without declaring, as it should not, that the defendant lacks any constitutional interest in sequestration. The footnote is set out in full for the readers' evaluation:

We are concerned our analysis may give rise to constitutional challenge every time a victim is allowed to remain in the courtroom during a criminal trial. Accordingly, we reiterate the observation made in *Rangel*, that “inconsistent statements of witnesses, whether they be by the actual victim or others, are in many cases simply a credibility factor that the finder of fact must weigh in determining the outcome.” *Rangel*, 866 P.2d at 612 n.6. Other Utah cases support this type of analysis, although none of them explicitly considered constitutional issues. *See State v. Bonza*, 72 Utah 177, 269 P. 480, 482 (1928) (finding no prejudice from trial court's refusal to exclude sister of rape victim from courtroom, noting “[t]here is no absolute right to have witnesses excluded during the progress of a trial.”); *see also State v. Moore*, 111 Utah 458, 183 P.2d 973, 977 (1947) (finding no prejudice from presence of rape victim throughout trial where she was first witness and her subsequent rebuttal testimony “merely categorically denied certain testimony”); *State v. Smith*, 90 Utah 482, 62 P.2d 1110, 1116 (1936) (finding no abuse of discretion where trial court allowed witness who violated exclusion order to testify); *State v. Green*, 89 Utah 437, 57 P.2d 750, 754 (1936) (finding no prejudice where witness who violated exclusion order referred to testimony of earlier witness in own testimony).

Beltran-Felix, 922 P.2d at 35 n.6.

⁴⁸*A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 115 (1997) (prepared statement of Paul G. Cassell, Professor, University of Utah College of Law) [hereinafter *Professor Cassell's 1997 Statement*].

Since Rule 615 of the Utah Rules of Evidence was modified to allow victims to be present, there is no reported opinion in which a court found exclusion required under the Constitution. Nevertheless, the possibility that such exclusion would occur in the interest of a fair trial is, in Professor Cassell's judgment, intolerable. On the other hand, Utah Rule 615 explicitly authorizes the prosecutor to exclude the victim without providing justification, which Professor Cassell finds “a largely theoretical point” because he is “unaware of any Utah prosecutor seeking to use this authority to exclude a victim from attending a proceeding that a victim wished to attend.” *Professor Cassell's 1998 Answers*, *supra* note 24, at 128. In an

Professor Cassell also argues that Judge Matsch's treatment of victims in the Oklahoma City bombing case demonstrates the need for a constitutional amendment protecting victims.⁴⁹ The record, however, does not support the claim. While Judge Matsch's rulings imposed burdens and some uncertainties on the victims in their efforts both to attend the proceedings and to offer victim impact statements, three points are significant. First, the case does not show that a clear statutory entitlement to be present is ineffective. Federal Rule 615, in effect at the time of the trial, called for exclusion of witnesses upon motion of either party, and unlike a number of states made no exception for victims.⁵⁰ Although those opposing the ruling argued that authority of the court to exclude victims under Rule 615 was eliminated by 42 U.S.C. § 10606(b)(4), that latter provision allows exclusion if the trial judge determines that the victim's testimony "would be materially affected if the victim heard other testimony at trial."⁵¹ Second, the case demonstrates the enormous political power of victims. Twice, while the McVeigh case was pending, Congress passed legislation to aid victims to attend and view the

earlier article, he defended giving prosecutors the power to deny victims the opportunity to be present "because effective prosecution is good for victims." Cassell, *supra* note 35, at 1393. Apparently, neither type of exclusion has ever occurred under Utah's present rule. I suggest that, with regard to the victim's interest in being present at trial, the possible exclusion by the court to ensure a fair trial should be no more intolerable than the possible exclusion by the prosecutor to assist with a successful prosecution.

⁴⁹See Professor Cassell's 1997 Statement, *supra* note 48, at 105-13.

⁵⁰See FED. R. EVID. 615. An amendment to Federal Rule 615 that took effect December 1, 1998, makes explicit that it is to yield to contrary statutory authorization, but the change does not create an absolute statutory right for victims to attend trials. That amendment provides an exception to sequestration for "a person authorized by statute to be present." FED. R. EVID. 615. The Committee Note to the proposed amendment states: "The amendment is in response to (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. § 10606, which guarantees, *within certain limits*, the right of a crime victim to attend the trial, and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. § 3510)." Electronic Mail from Daniel Capra, Reporter for the Federal Rules of Evidence, to Robert P. Mosteller, Professor, Duke Law School (Sept. 1, 1998) (copy on file with author) (quoting Advisory Committee role) (emphasis added).

Given that the Senate Judiciary Committee felt that a provision in the United States Constitution was appropriate to grant an unfettered right of victims not to be excluded, it is remarkable that the Committee did not propose to grant that right through rule to victims in federal criminal cases. Could the reason that this obvious action was not taken perhaps be that enacting the rule might have proved effective and undercut the argument that an amendment was necessary?

⁵¹42 U.S.C. § 10606(b)(4) (1994). A panel of the Tenth Circuit agreed that through this language, "[i]n essence, the statute acknowledges that the policies behind Rule 615 inherently limit the victim's right to attend criminal proceedings." *United States v. McVeigh*, 106 F.3d 325, 335 (10th Cir. 1997).

trial.⁵² The ability of victims to secure their interests through popular political action could not be clearer. Finally, the court did not bar in the end any victim who wanted to attend the trial from doing so because they were subsequently to be a witness, and victims who did attend the trial were not prevented from testifying as a result of their attendance.⁵³ Although the court ruled that the impact of attending the trial might result in exclusion if attending the trial was found to affect testimony,⁵⁴ upon holding a hearing, the court ruled that the victims who witnessed the trial had not been affected and could testify.⁵⁵

Perhaps more importantly, the conduct of Judge Matsch and the events of the Oklahoma City bombing trial simply do not support the basic position argued by Cassell that victims were denied their proper role. The bombing killed and injured hundreds, but it was also an act of domestic terrorism against America. Direct victims had an interest in participating, which was honored. As every observer of the trial knows, victims' voices were heard clearly and powerfully both during the trial of McVeigh and at his sentencing. For the country, the critical issue was whether justice was done under extraordinarily difficult circumstances of intense media scrutiny and great emotional tension. Judge Matsch performed admirably, if not perfectly, as he balanced his duties toward all interests, including society, his judicial duty to enforce the laws and the Constitution, and his prudential responsibility to avoid needless error.⁵⁶ He gave us all an expeditious, orderly, and fair trial.

⁵²See Chris Casteel, *Law Sets Bomb Victims, Families Free to Testify, View Trials*, DAILY OKLAHOMAN, Mar. 20, 1997, at 15 (discussing legislation passed in May 1997, as response to McVeigh trial, that allowed victims greater access to courtroom); Jeffrey Toobin, *Victim Power: How a New Legal Movement is Shaping the Oklahoma City Bombing Trial*, THE NEW YORKER, Mar. 24, 1997 at 40 (discussing history of victims' rights movement, specifically impact of McVeigh trial, and discussing victims' rights legislation passed in response to trial in April 1996).

⁵³See *United States v. McVeigh*, 958 F. Supp. 512, 514-15 (D. Colo. 1997).

⁵⁴See *id.* (issuing order amending previous order under Rule 615 such that victims could watch trial and potentially still give victim impact testimony, but reserving for later individual determination whether victim impact witnesses who saw trial were prejudicially affected by it).

⁵⁵See Penny Owen & Nolan Clay, *Judge Questions Victims, Allows Four to Testify*, DAILY OKLAHOMAN, June 5, 1997, at 12 (describing judge's rulings to permit victims who witnessed trial to give impact evidence).

⁵⁶Much of Professor Cassell's criticism of Judge Matsch appears to me unfair. For example, Cassell complains about the judge's failure to rule immediately that the Victims Rights Clarification Act of 1997 was constitutional, requiring victims to "make a painful decision." *Professor Cassell's 1997 Statement*, *supra* note 48, at 111. I invite readers to examine Judge Matsch's order to judge whether the injustice that Cassell suggests was committed. See *McVeigh*, 958 F. Supp. 512. I believe that the record shows that Matsch was reasonably trying to do justice and succeeded.

As stated by Judge Matsch in his order, applying the new legislation to the McVeigh trial

To cite this trial as a failure of justice for victims or as a clear illustration of the mistreatment of victims is both objectively unreasonable⁵⁷ and, I believe, contrary to the experience of the American public, who shared with more direct victims and survivors a personal stake in the trial, its outcome, and its fairness.

If the Oklahoma City bombing case requires enactment of a federal constitutional amendment, that is because its proponents find the mere existence of uncertainty as to their role intolerable. Neither such uncertainty nor putting victims at some minor risk of creating an appellate issue for

would have raised a novel but substantial constitutional issue, not from the Bill of Rights, but regarding separation of powers. The issue would have been raised by applying a new act of Congress to a specific ongoing criminal case, Judge Matsch noting that this constitutional argument was raised in the House of Representatives debate. *See id.* at 514; *see also* 143 CONG. REC. H1052 (daily ed. Mar. 18, 1997) (statement of Rep. Delahunt) ("I oppose the bill because I believe its efforts to influence a case now before the court strikes at . . . and threatens the separation of powers doctrine. . . ."). The legislation was signed on March 19, 1997. *See McVeigh*, 958 F. Supp. at 514. In his order issued less than a week later on March 25, 1997, Matsch noted that in another six days, the "trial of Timothy McVeigh is scheduled to begin," and "[a] debate now on the constitutionality of this new legislation would result in a delay of that trial." *Id.* He then modified his order, lifting his ban on attending trial by victims who were expected to be witnesses in the sentencing phase, and delayed until later resolution through a voir dire process whether those who chose to attend the trial had their testimony relevant to sentencing affected by witnessing the trial. *See id.* at 514–15. If not, they would have been able to testify even before the new law was passed. Under that circumstance, the new law would be irrelevant, and he could avoid the constitutional issue entirely. *See id.*

At the end of the guilt phase of the trial, Judge Matsch held a voir dire and, as noted earlier, ruled that no witness's testimony had been affected, eliminating any further issue as to their testimony. *See Owen & Clay, supra* note 55, at 12. He thus avoided delay, which he said in his order was in the "public interest," *McVeigh*, 958 F. Supp. at 515, and avoided entirely a constitutional issue from the case, *see id.* In my judgment, what he did has every appearance of reasonable judging and hardly constitutes the example of obvious injustice to victims that Cassell portrays it to be.

⁵⁷At hearings in the Senate Judiciary Committee in 1999, Beth Wilkinson, a prosecutor in the Oklahoma City bombing case, stated: "Some point to the Oklahoma City bombing trials as support for the proposed Victims' Rights Amendment, but in fact I believe that the trials proved that the interest of victims can be vindicated without a constitutional amendment." *Testimony of Beth A. Wilkinson Before the Senate Judiciary Comm. on the Proposed Victims' Rights Amendment* (Mar. 24, 1999) <<http://www.senate.gov/~judiciary/32499bw.htm>>.

Ms. Wilkinson added her voice in opposition to the Amendment:

It is because of my experience as a prosecutor in the Oklahoma City bombing trials and my involvement with numerous other terrorism and violent crime cases, that I respectfully oppose the Victims' Rights Amendment in its current form and urge you to consider statutory alternatives to protect the rights of victims.

Id. Ms. Wilkinson noted both that the proposed amendment might have destroyed the possibility of a critical plea agreement with Michael Fortier and that it could undercut the prospect of a just conviction, which is central to our values and to victims' critical interest in not having the case reversed on appeal. *See id.*

defendants with regard to sequestration, discussed earlier,⁵⁸ provides a sufficient justification for a federal constitutional provision.⁵⁹ Indeed, the weakness of these justifications demonstrates the extreme nature of Professor Cassell's argument and constitutional analysis. Unless victims' rights under the Amendment are to be absolute or the defendant has no constitutional right under due process to object to victims' presence under any circumstances, then enacting a federal constitutional provision will not eliminate the uncertainty in some circumstances.

Professor Cassell does not claim the first possibility—that the victims' rights are absolute. In connection with the April 28, 1998, hearings on Senate Joint Resolution 44, Senator Patrick Leahy posed a written question to Professor Cassell: "What do you think about amending [Senate Joint Resolution] 44 to state that nothing in the amendment shall diminish the constitutional rights of the defendant?"⁶⁰ Professor Cassell proposed alternative language that "[i]n cases of conflict, the rights of the accused or convicted offender and the victim shall be reasonably balanced."⁶¹ Such language "would simply codify what I assume would be the outcome without any such language. Courts today are used to balancing constitutional rights."⁶² Thus, he must recognize that some uncertainty will remain where constitutional rights intersect.

However, Professor Cassell believes that in this instance, balancing would not be required because defendants simply have no constitutional right to exclude witnesses: "[T]here is no constitutional footing for concluding that, under contemporary constitutional principles, a criminal defendant has a federal constitutional right to exclude crime victims from trials."⁶³ In addition to being of questionable validity, Professor Cassell's view renders unnecessary a constitutional provision protecting the right of victims to be present. Since, in his opinion, the defendant has no constitutional basis to exclude a victim, an unqualified statutory declaration that victims may not be excluded would be entirely sufficient. As is characteristic of arguments of the

⁵⁸See *supra* text accompanying note 48.

⁵⁹See *supra* notes 36–46 and accompanying text (discussing impact of defendants' rights on sequestration of witnesses).

⁶⁰*Professor Cassell's 1998 Answers*, *supra* note 24, at 127.

⁶¹*Id.*

⁶²*Id.*

⁶³Paul G. Cassell, *Victims' Rights Amendment Not a Threat to Defendant's Rights*, STATE-FEDERAL JUDICIAL OBSERVER, Apr. 1997, at 3, 4.

Amendment's supporters on the issue of "trumping,"⁶⁴ his positions are mutually incompatible.

Instead, the reasonable interpretation of constitutional principles and of the case law is that in extreme factual situations, the due process right to a fair trial may require exclusion of witnesses. Those cases are rare and reasonably easy to recognize, but admittedly some uncertainty will remain in the few cases that approach the constitutional requirement of exclusion. However, the uncertainty is hardly intolerable given the limited period of time a victim needs to be excluded if sensibly called as the prosecution's first witness and given the importance of guaranteeing a fair trial to the defendant where the constitutional claim has arguable merit.

I want to amplify my position on the constitutional basis for sequestration, which goes to the lack of wisdom in granting victims a blanket right to be present when they could tailor their testimony to that of others who testify. Indeed, a by-product of eliminating the possibility of sequestration may be to eliminate other checks on contrived testimony. In this discussion, I will concentrate on a group of cases where defendants are often innocent.

The mere fact that multiple alleged victims are also eyewitnesses does not, in my judgment, mean that failure to sequester the victims/witnesses would be a *per se* constitutional violation of either the Sixth Amendment right to effective cross-examination⁶⁵ or the due process right to a fair trial. With respect to the right to effective cross-examination, the Supreme Court, I believe, would be very unlikely to declare this one imperfection in the right to cross-examine to be automatically constitutionally deficient. Constitutional violations of fair trial rights are understandably rather difficult to show and

⁶⁴On this issue, the arguments of the Amendment's proponents are a set of inconsistencies. On the one hand, they argue that the proposed amendment will not interfere with defendants' constitutional rights. See S. REP. NO. 105-409, at 80-81 (1998) (additional views of Sen. Biden) (arguing that Amendment will not deprive accused of rights). As set out generally above, see *supra* text accompanying notes 1-2, they more frequently argue that the Amendment is necessary to prevent defendants' rights from trumping victims' rights, thus meaning that, of course, victims' rights will be limited. They further argue that the Amendment is necessary to prevent the rights of victims from being trampled as part of a balancing process that they contend courts will reflexively resolve in favor of defendants. However, they also argue that such balancing between defendants' and victims' rights will necessarily and properly take place as a way to prevent injustice when a conflict arises. See *Professor Cassell's 1998 Answers*, *supra* note 24, at 127 (noting that courts are apt to balance interests of victims and accused where necessary).

⁶⁵See Mosteller, *An Effort to Recast the Battle*, *supra* note 29, at 1699-1701 (noting uncertainty whether "multiple-eyewitness" situations like Rodney King case would constitute "extreme circumstances" in which "a blanket rule prohibiting exclusion of victims from any public judicial proceeding" would violate defendants' Sixth Amendment right to cross-examination).

depend upon the precise circumstances of the case, including the impact of the failure to sequester on testimony or whether other avenues of defense attack and proof are available. Only in the atypical case and in context will failure to sequester multiple alleged victims/eyewitnesses result in a constitutional violation.⁶⁶ My position that failure to sequester would rarely and not automatically violate the Constitution is, however, not equivalent to a concession that the defendant has no constitutional basis to require sequestration.

In terms of the innocent defendant, why is a rule allowing alleged victims/eyewitnesses to remain in the courtroom a bad policy and why is it particularly a bad constitutional rule? I want to concentrate on a very troubling class of cases in American criminal law where the identity of the true victim is sometimes ambiguous. That is the class of cases where *either* the police used excessive force toward a suspect, often the member of a minority group, *or* the police were the victims of an assault by that suspect and rightfully defended themselves with force. Two cases—Rodney King in Los Angeles in 1991⁶⁷ and Abner Louima in New York City in 1997⁶⁸—provide excellent examples to examine. In both cases, we know that the police were the perpetrators, not the victims. In King's case, we know the truth because a bystander made a videotape of the beating,⁶⁹ in Louima's case, our knowledge came from his punctured intestine, which permitted no pro-police explanation.⁷⁰ However, in both cases, the true victim was on his way to being the defendant and the police officers the victims before the irrefutable proof got in the way.

⁶⁶*Pennsylvania v. Lavelle*, 419 A.2d 1269 (Pa. Super. 1980), provides a benchmark for where sequestration would be constitutionally required. In that case, the court noted that it was unclear that the eyewitnesses had participated in a pretrial identification process. *See id.* at 1273. They nevertheless sat in the courtroom and listened, first to a police officer who provided damning evidence implicating the defendant, and then to each other making identifications of the defendant. *See id.* at 1273–74. The court found that the failure to sequester violated the defendant's right to a fair trial. *See id.* at 1273.

⁶⁷*See, e.g.,* Tracy Wood & Faye Fiore, *Beating Victim Says He Obeyed Police*, L.A. TIMES, Mar. 7, 1991, at A1 (discussing Rodney King beating).

⁶⁸*See* Blaine Harden, *Angry Giuliani Orders Shake-up at Police Station; Alleged Assault on Immigrant "Reprehensible," Mayor Says*, WASH. POST, Aug. 15, 1997, at A3 (discussing alleged assault on Haitian immigrant by New York police officers).

⁶⁹*See generally* Wood & Fiore, *supra* note 67, at A20 (noting that "[t]he videotape revealed that as many as a dozen officers surrounded King and at least three took part in the clubbing while others stood by and watched.").

⁷⁰*See* Harden, *supra* note 68, at A3 (stating that immigrant victim "is in intensive care with punctured intestines and a damaged bladder—wounds doctors say were caused by a blunt instrument").

Imagine the alternative scenario under which the proof of police brutality did not surface, and Officers Koon and Powell and Louima's attackers would be cast as victims/witnesses. Further, recognize that there must be a substantial number of cases like King's and Louima's where fortuity or physical evidence does not prevent the police from covering their excessive violence with a charge against the true victim. These were not isolated incidents.⁷¹ The literature in the field is replete with the seriousness of this problem of police abuse being covered by charges of violence by the suspect.⁷²

Now consider the impact of a rule allowing all alleged victims/witnesses to be present during the testimony of all other alleged victims/witnesses and the further impact of a victims' rights constitutional amendment. As noted above, that there are multiple alleged victims/eyewitnesses does not mean that a rule of evidence or statute that guarantees victims' presence violates the Constitution,⁷³ and the fact that the defendant is innocent has no automatic impact on this analysis. In providing procedural protection, the Constitution is not a precise instrument. Thus, if a domestic rule of evidence were to permit all alleged victims/witnesses to remain in the courtroom, the rule would typically pass constitutional muster, and in cases of police brutality, it would help the perpetrators of violence extend the injustice by convicting the true victim.

The outcome under the Amendment is worse, however. Even the rare cases where under our existing Constitution sequestration would have been required, the new provision would trump justice. Officers Koon and Powell would have the constitutional right to be present if preliminarily labeled the victims of Rodney King's violence regardless of whether other ways to ensure effective cross-examination and overall fairness existed. Contrived joint testimony may be even more effective if the case is prosecuted in a state where the Amendment has been supplemented with an aggressive state amendment designed to inhibit defense efforts.

Arizona has one of the most aggressively anti-defendant state victims' rights amendments. Earlier in this essay, I examined in the *Romley* case how the prosecution attempted to use Arizona's constitutional provision guaranteeing victims a right not to be required to provide discovery to keep helpful

⁷¹See Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833, 845-46 (1997) (noting several other incidents of police abuse caught on videotape during mid-1990s).

⁷²See, e.g., PAUL CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* 51-62 (1969); CHARLES G. OGLEGREE, JR., ET AL., *BEYOND THE RODNEY KING STORY* 42-44 (1995).

⁷³See *supra* notes 65-66 and accompanying text (discussing cases that balanced victims' right of presence and defendants' right to fair trial under witness sequestration rules).

psychiatric evidence from the defense, an effort that was properly thwarted by the Federal Due Process Clause.⁷⁴ This same provision can have an impact in police brutality cases. Several years after the state victims' rights amendment was approved by the electorate, the Arizona Legislature attempted by statute interpreting the amendment to exclude police officers from the discovery protection provision.⁷⁵ The statute allowed discovery interviews "if the act that would have made him a victim occurs while the peace officer is acting in the scope of his official duties."⁷⁶ However, that legislation was ruled unconstitutional because it was inconsistent with the plain language of the amendment.⁷⁷ Thus, in Arizona, a police officer cannot be forced to provide an interview.⁷⁸ Moreover, if the defense attorney comments on the victim's refusal to be interviewed, the trial judge is required to instruct the jury that the victim had the right of refusal under the state constitution.⁷⁹ The Arizona Supreme Court also ruled that, absent a showing that the refusal was done "for a reason or in a manner bearing on [the witness's] credibility,"⁸⁰ the trial court could properly cut off cross-examination about the victim's refusal to be interviewed because the witness would be presumed to have acted solely because he or she had a constitutional right to do so.⁸¹

In the absence of a federal victims' rights amendment that gave alleged victims the constitutional right to be present at trial, the combination of conditions in an Arizona police brutality case might mean that sequestration was constitutionally required to assure a fair trial. If the Amendment is adopted, police officers who use excessive force and cover that violence with charges that they were assaulted will have an important new weapon in their arsenal of deception. The Amendment and related state constitutional provisions, if enacted, could make the dangers even greater. Presence would be constitutionally guaranteed and alternative methods to reveal and sanction

⁷⁴See *supra* notes 26–30 and accompanying text.

⁷⁵See *State v. Roscoe*, 912 P.2d 1297, 1299 (Ariz. 1996) (reciting history of enactment of ARIZ. REV. STAT. § 13-4433(F)).

⁷⁶ARIZ. REV. STAT. ANN. § 13-4433(G) (West Supp. 1998) (formerly subsection F).

⁷⁷See *Roscoe*, 912 P.2d at 1303 (holding statute unconstitutional insofar as it conflicts with term "victim" in Arizona Constitution's Victims' Bill of Rights).

Professor Cassell has called for an example of a state victims' rights amendment producing unintended consequences. See Cassell, *supra* note 13, at 41 n.261. This is one such case.

⁷⁸See *Roscoe*, 912 P.2d at 1302–03 (stating that "victims have a constitutional right to decline interviews").

⁷⁹See ARIZ. REV. STAT. ANN. § 13-4433(F) (Supp. 1998) (formerly subsection E).

⁸⁰*State v. Taggart*, 942 P.2d 1159, 1163 (Ariz. 1997).

⁸¹See *id.* ("We will presume that [the victim witnesses] refused the interview solely because they had a constitutional right to do so.").

contrived testimony, such as discovery from the victim, cross-examination, and comment, might disappear. Thus, the passage of the Amendment would increase the chances that sequestration was required for a fair trial and at the same time mean that as to both true and contrived victims sequestration could no longer be ordered under the Constitution.

Returning to the other claims in the NVCAN quotation,⁸² one finds claims that “the defendant’s right to be free from cruel and unusual punishment has been used to deny victims the right to be heard at sentencing,” and that “the criminal’s right to equal protection has been used to deny victims the rights to be heard at parole hearings.”⁸³ However, the argument that the Eighth Amendment’s cruel and unusual punishment provision⁸⁴ forbids victim impact evidence is largely untenable after *Payne v. Tennessee*,⁸⁵ which held that victim impact evidence did not violate this constitutional provision.⁸⁶

The Court in *Payne* did not decide whether a “victim’s family members’ characterizations and opinions about the crime, the defendant, and the appropriate sentence” were admissible because those questions were not presented.⁸⁷ Thus, *Payne* did not resolve whether a victim’s family members could express their opinion regarding the proper punishment.⁸⁸ Similarly, the Court refused to eliminate limitations on the admissibility of victim impact evidence based, not on Eighth Amendment principles, but on relevancy.⁸⁹ The relevancy of victim impact evidence depends on the structure of the jurisdic-

⁸²See *supra* text accompanying note 2 (quoting NVCAN BACKGROUND KIT).

⁸³NVCAN BACKGROUND KIT, *supra* note 2, at 9.

⁸⁴See U.S. CONST. amend VIII.

⁸⁵501 U.S. 808 (1991).

⁸⁶See *id.* at 826–27 (upholding decision to allow evidence of murder’s impact on survivors and prosecutor’s argument about such harm).

⁸⁷*Id.* at 830 n.2.

⁸⁸In *Booth v. Maryland*, 482 U.S. 496 (1987), the earlier Supreme Court case that *Payne* largely overruled, the Court had held opinions of the proper sentence by victim’s family members inadmissible. See *Booth*, 482 U.S. at 508–09. Since that issue was not addressed in *Payne*, *Booth*’s holding on this point remains technically valid. See *Payne*, 808 U.S. at 830 n.2 (noting that decision is limited to holding in *Booth* “that evidence and argument relating to the victim and the impact of the victim’s death on the victim’s family are inadmissible at capital sentencing hearings.”). Nevertheless, the Oklahoma Court of Criminal Appeals has found that such evidence is admissible and has determined that *Booth* was implicitly overruled on this point. See *Ledbetter v. State*, 933 P.2d 880, 890–91 (Okla. Crim. App. 1997) (stating that “*stare decisis* appears to dictate since the Eighth Amendment rationale supporting the ban of the other victim impact evidence in *Booth* was overruled by *Payne*”).

⁸⁹See *Payne*, 501 U.S. at 827 (allowing states to conclude that victim impact evidence is relevant to jury’s death penalty decision).

tion's death penalty statute and the role defined for impact evidence in it,⁹⁰ and as a result, most relevancy objections likely could be eliminated by statutory modifications without any amendment.

Enacting the Amendment and giving victims the right "to be heard . . . at all proceedings to determine . . . a sentence"⁹¹ could be read as changing these relevancy rules, and could specifically be seen as overriding determinations in some jurisdictions that family members of murder victims are forbidden from expressing their opinion that the death penalty should not be imposed.⁹² However, the drafters of Senate Joint Resolution 44 claim that this constitutional right does not affect the relevance issue. Indeed, these drafters claim that the constitutional right to be heard at sentencing does not affect the relevance issue. The Majority Report asserts that while the victim may not be prevented from providing a statement when the sentence is mandatory and therefore the statement is irrelevant to the outcome,⁹³ the federal and state governments continue to have the ability to exclude such evidence by setting limits on what is considered relevant impact testimony, including the expression of an opinion on the "desirability or undesirability of a capital sentence."⁹⁴ Thus, if after *Payne*, victims' rights advocates continue to worry about the scope of permissible impact evidence and the possibility that such evidence could be "trumped" by state law, much the same concern would remain after enactment of the Victims' Rights Amendment, as embodied in Senate Joint Resolution 44. In capital cases, the victim's right to be heard would continue to be constrained by state and federal law; more generally, the right to be heard at sentencing would remain subject to legislative relevancy determinations except where, under traditional terminology, such testimony was irrelevant to the outcome of the sentencing proceedings in that the sentence was mandatory and such statements could have no impact on it.⁹⁵

⁹⁰See *State v. Moore*, 927 P.2d 1073, 1085–87 (Or. 1996) (noting that because relevancy rules apply to death penalty determinations, evidence presented must help prove issues defined by death penalty statute).

⁹¹S.J. Res. 44, 105th Cong. (1998).

⁹²See, e.g., *Robison v. Maynard*, 943 F.2d 1216, 1216–17 (10th Cir. 1991) (holding that such evidence was not proper mitigating evidence and not required to be admitted under Court's ruling in *Payne*).

⁹³See S. REP. NO. 105-409, at 28 (1998) (stating that "a victim will have the right to be heard even when the judge has no discretion in imposing a mandatory prison sentence").

⁹⁴*Id.* at 28–29 (citing *Robison*, 943 F.2d at 1216).

⁹⁵Marsha Kight, whose child was killed in the Oklahoma City bombing, is a well known advocate for victims' rights and the constitutional amendment. She testified at the 1997 Senate hearings on the Amendment that as a death penalty opponent she supported a constitutional amendment so that she could give victim impact evidence. In her case, the statement would have included a statement regarding that opposition, which she had been told by the prosecution team she could not give under existing law. See *A Proposed Constitutional*

Finally, NVCAN's claim that equal protection had been used to prevent victims from being heard at parole hearings was correct for a time under one federal district court opinion. However, that opinion was soon vacated. In *Johnson v. Texas Department of Criminal Justice*,⁹⁶ a district court judge held that victim protest letters that were kept from the inmate and used to deny parole violated equal protection.⁹⁷ As is typical for trial court opinions unfavorable to victims' rights, the case was reversed.⁹⁸

In sum, a body of case law documenting significant "trumping" of victims' rights by defendants and court officials using the Federal Constitution simply does not exist. Certainly here again, the claim of excessive deference by the courts to defendants' rights is unsupported. The best that supporters of the Amendment can do is to suggest arguments why these cases cannot be found. However, the extraordinary step of amending the United States Constitution should require real documentation rather than conjecture, unfounded assertions, and outdated claims. When challenged to produce the cases of defendants' rights running roughshod over victims' rights, the Amendment's supporters have provided only suppositions about why proof cannot be found, but undeniably, they have come up empty. Baldly stated, the very strongest of the Amendment's proponents have been challenged to

Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. On the Judiciary, 105th Cong. 71-72 (1997) (testimony of Marsha A. Kight). According to the Majority Report, after the Amendment, Ms. Kight could not be prevented from testifying as long as she was satisfied not to express her opinion about the death penalty and thereby to have her statement used in support of the prosecutor's effort to secure the death penalty. Thus, any statement about her opposition to capital punishment would be just as inadmissible after the Amendment as before, see S. REP. NO. 105-409, at 28-29 (1998), and the government's decision to use victim impact evidence to support its goal of securing a death penalty would have continued to bar her from testifying. To be admissible, the testimony must be authorized by statute, which likely would have permitted admissibility under current law without a constitutional amendment. The predominant concern on this issue appears to be insuring that the legislature can protect prosecutorial interests—"Prosecutorial Benefit"—and only to guarantee full "Participatory Rights" to be heard at sentencing where irrelevant to the legislatively determined result. See generally Mosteller, *Moving from Guaranteeing Participatory Rights*, *supra* note 29, at 1054 (discussing theory of "Prosecutorial Benefit" and goal of "Participatory Rights").

⁹⁶910 F. Supp. 1208 (W.D. Tex. 1995).

⁹⁷See *id.* at 1226 (holding that "statutes allowing protest statements to be received and considered are hereby found unconstitutional").

⁹⁸See *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997) (holding that because it was not demonstrated "that the states' action targeted a discernible sub-class among the general prison population, the magistrate judge's ruling must be reversed"). For other cases following this pattern, see, for example, *State v. Taggart*, 925 P.2d 710 (Ariz. Ct. App. 1996), *rev'd en banc*, *State v. Riggs*, 942 P.2d 1159, 1165-66 (Ariz. 1997); and *State v. Muhammad*, 678 A.2d 164, 182 (N.J. 1996).

document their case, and they have failed. When the question is whether to amend the United States Constitution, the burden has not been met.

II. THE (INTENDED) DAMAGE TO DEFENDANTS' RIGHTS FROM THIS UNNECESSARY AMENDMENT

One consequence of using a constitutional amendment rather than legislation to guarantee victims' rights is that defendants' constitutional rights can be undermined by enactment of an amendment. If this is the intended effect of the Amendment, then I must concede that the constitutional form is necessary. However, I hope that if this purpose is recognized, it will be rejected as substantively illegitimate.

I have already discussed at some length how the Amendment may impact witness sequestration issues by affecting where the balance is drawn between defendants' fair trial rights and victims' presence. In addition, the Amendment would grant several more rights to victims that would alter present protections for the defendant. First, the Amendment contains the right "to consideration of the interest of the victim that any trial be free from unreasonable delay."⁹⁹ Second, the Amendment establishes the right "to consideration of safety of the victim in determining any conditional release from custody relating to the crime."¹⁰⁰ These provisions almost inevitably would impact criminal proceedings to the detriment of fairness to some defendants.

Although the defendant has the right to a speedy trial, he or she may waive that right explicitly or implicitly and seek a continuance to provide more time to prepare a defense or to allow the effects of pretrial publicity to dissipate. A victim's right to consideration of his or her interest in a speedy trial would, in some cases, alter a judge's treatment of the defendant's request for a delay. That denial may threaten the defendant's interest in a fair trial.¹⁰¹ Similarly, a victim's right to consideration of safety in the decision to grant

⁹⁹S.J. Res. 44, 105th Cong. § 1 (1998).

¹⁰⁰*Id.*

¹⁰¹Professors Tribe and Cassell argue that the defendant's constitutional rights and the victim's rights in the proposed Amendment would coexist without conflict, using the claim that the two rights relating to a speedy trial "[b]y definition . . . could not collide, since they are both designed to bring matters to a close within a reasonable time." Tribe & Cassell, *supra* note 1, at B5. The argument is nothing but a straw man. The conflict is not between the defendant's Sixth Amendment right to a speedy trial and the similar guarantee to the victim in the proposed Amendment. The conflict is obviously between the defendant's fair trial rights when they require delay and the proposed victim's right to a speedy resolution that could deny that delay.

conditional release would alter the results in some number of bail decisions resulting in denial of release.¹⁰²

These provisions giving victims' interests consideration in a "speedy trial" and in denying bail to defendants constitute changes in a balance of advantage that not only affect the victim, but also affect substantial interests of the defendant and may even alter the outcomes of cases. If these specific changes are to be made, they first should undergo rigorous debate on their merits, and should not slide in under the cover of a campaign largely devoted to giving victims rights to notice and to participate in criminal proceedings.

However, as I have noted in an earlier article, the most significant substantive impact of the Amendment in denigrating defendants' rights may be in the reconceptualizing of criminal trials to be between a defendant and a victim, each with constitutional entitlements.¹⁰³ In my judgment, probably the most significant point made at the Symposium was the acknowledgment by Professor Pizzi, who supports the proposed Amendment, that he finds such a reconceptualization possible, and for him welcome.¹⁰⁴ While not confident of the exact steps by which it would come about, he expressed the hope that enactment of the Amendment would add a new weight to the balance and cause courts to eliminate the exclusionary rule for some Fourth Amendment violations.¹⁰⁵ As he wrote in his Symposium paper,

[W]here the crime is a serious one and the police have made a good faith mistake or have acted at most carelessly, is it fair to the victim to suppress evidence of the crime? A Victims' Rights Amendment suggests that

¹⁰²Denying release to those charged with a crime may appear appealing as a means to reduce additional victimization by the accused while awaiting trial. However, clearly not all those accused of crime are guilty. Scholars have noted the consistent tendency of more restrictive release conditions to result in disproportionate denial of release to members of minority groups. See CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 167-71 (1993) ("The criteria established for pretrial release may still be discriminatory on the basis of economic status and skin color."). Also, pretrial confinement may interfere with the defendant's ability to help develop a successful defense, and thereby increases the prospect of convicting the innocent.

¹⁰³See Mosteller, *An Effort to Recast the Battle*, *supra* note 29, at 1710-11 (1997) (noting that ancient statement of preference that it is better that ten guilty defendants erroneously escape punishment than that one innocent defendant be punished is conceptually more difficult to maintain if state also recognizes constitutional rights of victims against state).

¹⁰⁴See William T. Pizzi, *Rethinking Our System* 9 (Sept. 3, 1998, draft) (on file with *Utah Law Review*). This view was reiterated and discussed during the Symposium. Professor Pizzi has reoriented his paper for final publication, but he authorized me to quote and cite his initial draft.

¹⁰⁵See *id.*

victims of crimes of violence have an interest in a fair trial and it may cause the Court to rethink the exclusionary rule.¹⁰⁶

As argued in earlier sections, the Amendment is unnecessary to accomplish what I consider are its legitimate aims with respect to ensuring participatory rights of victims. It is, however, both specifically and generally dangerous in allowing substantive harm to important procedural protections presently accorded to defendants.

III. GIVING VICTIMS EQUALITY WITH DEFENDANTS IN THE CONSTITUTION

My last point suggests a final, frequently presented argument that I must confront. The Amendment's proponents, particularly in political settings, often claim that since defendants are protected in the Constitution, victims should have rights guaranteed there as well.¹⁰⁷ Sometimes the Amendment's supporters highlight the apparent imbalance by noting that fifteen rights are enumerated in the Constitution to protect the accused and none specifically protects victims.¹⁰⁸

The rhetorical argument is: How could we possibly have federal constitutional provisions that protect those charged with crimes—the vast majority of whom are guilty and many of whom have committed horrible offenses—and not give similar protection to their innocent victims? This is a superficially attractive argument that engenders great popular political appeal. However, this claim mistakes the fundamental reason for enacting a principle as a constitutional amendment. Indeed, the enormous political popularity of the argument almost by itself refutes its validity as an argument for amending the Constitution.

The major purpose of a constitutional amendment of the type considered here is to protect the despised, the politically weak, and insular minorities against the whims of the political majority.¹⁰⁹ Victims and victims' rights do not fall into any of these categories; they are extremely popular politically.

¹⁰⁶*Id.*

¹⁰⁷See Cassell & Twist, *supra* note 3, at A15 ("The Victims' Bill of Rights Amendment would bring balance to a system whose scales of justice are tipped decidedly in favor of the accused.").

¹⁰⁸See, e.g., Dianne Feinstein, *Senate Judiciary Committee Passes Kyl-Feinstein Crime Victims' Rights Constitutional Amendment*, July 7, 1998, available in 1998 WL 7352112, at *2 (Press Release) ("Currently the U.S. Constitution spells out 15 specific rights to the accused in our society, but none for victims.").

¹⁰⁹*Cf.* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (recognizing that purpose behind Fourteenth Amendment is to protect politically weak and insular minorities).

That is not the case with criminal defendants. If the protections and the advantages afforded criminal defendants in the Constitution are eliminated or “equalized” by the Amendment, there will be no political majority passing legislation and appropriating money to provide offsetting protections for defendants. Without the Amendment, the political majority can and will protect victims. Thus, the “imbalance” in the Constitution must remain if anything approaching a balance is to be achieved at the end of the process, after the political forces have had their impact.

IV. CONCLUSION

In this essay, I believe that I have established that the Amendment is not necessary to achieve the goals of its advocates. My argument is simple: Given the total failure of proof, the burden has not been met, and the Amendment should not be enacted. That its supporters may be able to marshal the political forces to adopt this amendment in service of a popular cause does not provide sufficient justification to change the fundamental document of our nation, a document that must resist easy change so as to protect our most basic, but sometimes unpopular, liberties.

My position that the Amendment is unnecessary is far from radical. I wrote this essay for the Symposium held in September of 1998. Much to my pleasure, I learned that some time later a very distinguished conservative member of Congress, Senator Orrin Hatch, stated a similar view. Although he nonetheless voted in the Senate Judiciary Committee to support the Amendment, Senator Hatch ended his statement regarding the Amendment as follows:

In conclusion, I am strongly in favor of victims’ rights, and believe a Federal constitutional amendment to be an appropriate national response. “Appropriate,” however, does not, in my view, mean “necessary.” I believe that many of the objectives of the proposed amendment could in fact be accomplished through a Federal statute, State statutes, or State constitutional amendments. Indeed, our experience with State constitutional amendments is comparatively young. It may well be better to allow the jurisprudence to develop on these before we take the momentous step of amending the Federal Constitution.

Finally, I note that a statutory approach would carry less peril of upsetting established State constitutional amendments now taking root to guarantee the rights of crime victims. A statute would also be more readily amendable should experience dictate that changes are needed, and, of course, would not preclude the later adoption of a constitutional amend-

ment if the statute indeed proved insufficient or unable to protect the rights of victims.¹¹⁰

A reader of Professor Cassell's article will observe that he responds to a very large number of objections raised by scholars and groups spanning much of the criminal justice and the intellectual spectrum. Sometimes these objections come from apparently competing sides—those interested in protecting defendants' rights and those interested in effective prosecution. Many of these arguments indeed constitute serious reasons for concern, despite Professor Cassell's efforts to diminish them. Depending upon how the Amendment is shaped in the very uncertain post-enactment world, as legislatures and courts enforce and interpret its provisions, these competing interests may, in fact, all suffer harm in different parts of the same case or in different types of cases. In particular, there is no reason to believe that the various harms to prosecution and defense interests magically will counterbalance each other so that justice is done. They may just as easily result in a series of injustices—first to one side, then the other.

What should be clear from Professor Cassell's lengthy recitation of the various objections from conservatives and liberals, defense and prosecutorial interests, and judges is that the Amendment does not command an intellectual consensus among those who have examined carefully its provisions. To the contrary, the Amendment creates grave unease. We should not take lightly the voices of caution from these sources, who are among the most knowledgeable about the criminal justice system.

My hope is that those who are interested in this Symposium will spend time investigating the Amendment carefully.¹¹¹ The Amendment is an absolute winner at the level of sound-bite politics, but it does not, in my judgment, withstand serious, neutral examination.

Moreover, the prospect of its passage is very real and should be of serious concern to all who care about either the shape of criminal litigation or the Constitution. Those committed to enacting the Amendment carried it through the Senate Judiciary Committee on July 7, 1998. I sense from those supporters an optimism that they can move it through the 106th Congress and then to the states, where I fear passage is very likely, given the almost irresistible political attractiveness of the concept of victims' rights. However, while political odds may not be favorable to my position, the contest is not yet lost. At least it should now be clear that those favoring the Amendment cannot make a case that it is necessary. The proponents should not prevail if

¹¹⁰S. REP. NO. 105-409, at 46 (1998) (additional views of Sen. Hatch).

¹¹¹For additional information about the Amendment, I may be contacted at mosteller@law.duke.edu.

the issue is decided, as it should be, on the merits, rather than on superficial political appeal.

